1992

Salt Lake City v. Richard Copier : Brief of Appellee

Utah Court of Appeals

Robert H. Copier; Attorney for Appellant.
Cheryl D. Luke; Marsha S. Atkin; Salt Lake City Prosecutor\'s Office; Attorneys for Appellee.

CHERYL D. LUKE, #2013
MARSHA S. ATKIN, #5246
ATTORNEYS FOR PLAINTIFF/APPELLEE
SALT LAKE CITY PROSECUTOR'S OFFICE
451 SOUTH 200 EAST, #125
SALT LAKE CITY, UTAH 84111
TELEPHONE: 535-7767

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,

Plaintiff/Appellee,

v.

RICHARD COPIER,

Defendant/Appellant.

Case No. 92-0777-CA

Priority 2

BRIEF OF APPELLEE

Appeal from a Judgment and conviction of Driving Under the Influence of Alcohol in violation of Salt Lake City Ordinance 12-24-100, a Class B misdemeanor, in the Third Circuit Court of Salt Lake County, Salt Lake Department, Honorable Dennis M. Fuchs, presiding.

Cheryl D. Luke
Marsha S. Atkin
Salt Lake City Prosecutor's Office
451 South 200 East, #125
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellee

Robert H. Copier
243 East 400 South, Suite 200
Salt Lake City, Utah 84111
Attorney for Defendant/Appellant

CHERYL D. LUKE, #2013
MARSHA S. ATKIN, #5246
ATTORNEYS FOR PLAINTIFF/APPELLEE
SALT LAKE CITY PROSECUTOR'S OFFICE
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Salt Lake City Prosecutor's Office
451 South 200 East, #125
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellee

Robert H. Copier
243 East 400 South, Suite 200
Salt Lake City, Utah 84111
Attorney for Defendant/Appellant

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MARSHA S. ATKIN, #5246
ATTORNEYS FOR PLAINTIFF/APPELLEE
SALT LAKE CITY PROSECUTOR'S OFFICE
451 SOUTH 200 EAST, #125
SALT LAKE CITY, UTAH 84111
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Statement of Jurisdiction

Jurisdiction for this case is conferred upon the Court of Appeals pursuant to Utah Code Ann. Section 78-2a-3(2)(d) (1953, as amended).

Statement of Issues and Standards of Review

Appellant argued only one issue, whether the Salt Lake City ordinance for driving under the influence of alcohol is a public offense as its language slightly differs that the language used in the Utah State Code. This Court should give no deference to the ruling made in the trial court as it is a question of law and an interpretation of statute.

Appellee raises a second issue that there is additional language in City and State statutes that is identical. That language is an alternative to a person taking a chemical test and could have been the basis for the jury verdict to convict defendant. The standard of review is unclear as there is no transcript of the lower proceedings. However, appellee asserts that the record reflects sufficient evidence to uphold the jury's verdict.

Determinative Provisions or Statutes

The determinative statutes for this case are Section 12-24-100 of the Salt Lake City Code and Section 41-6-44, Utah Code Ann. 1953 (as amended). Copies of the above statutes in effect at the time of the proceedings in this case are set out in the Addendum attached hereto.

Statement of Case

Defendant/Appellant Richard Copier (hereinafter referred to as defendant) was charged by way of Information with Driving Under the Influence of Alcohol, a Class B misdemeanor, which offense occurred on May 30, 1992, in Salt Lake City, Utah. The case was tried to a jury on August 24, 1992, with the Honorable Dennis M. Fuchs presiding. The jury found defendant guilty (R. 43) and he was subsequently sentenced by the Court (R. 66, 67-68).

Statement of Facts

As no transcript has been filed in this case, the following facts are set out to provide this Court with some factual basis and understanding for defendant's conviction.

A Salt Lake City police officer stopped defendant after observing him run a red light. Defendant stated that he had had a few drinks at a party, which was confirmed by the officer's notation that he had a strong odor of alcohol on his breath. Defendant took field sobriety tests but he was unable to perform them adequately. He took a breath test at the Salt Lake City Police Department, with a result of .101, as shown by the Intoxilyzer-Alcohol Analyzer test record card which was admitted into evidence (A copy of the Operational Checklist and test record card are attached in the Addendum hereto. They were admitted into evidence by the trial court but withdrawn at the end of trial. R. 50, 51). The Intoxilyzer 5000 machine used by the Salt Lake City police was properly maintained and working correctly at the time defendant submitted to the breath test.

Summary of Argument

The Salt Lake City ordinance has only a semantic difference from the driving under the influence provision in the State Code. Appellant has provided no reasoning or basis to show that the variance is "materially different". The City ordinance should be liberally construed as the underlying policies of the City and State laws are the same.

City and State driving under the influence laws both have alternative language to proving the results of a chemical test. A person can be found guilty if he is "incapable of safely operating a vehicle". As that issue was also submitted to the

jury, it could have been the basis for their decision, which should be upheld by this Court.

Argument

I. THE SALT LAKE CITY DUI ORDINANCE SETTING OUT A "O.08% OR GREATER BY WEIGHT" STANDARD CONSTITUTES A PUBLIC OFFENSE EVEN THOUGH THE STATE STANDARD WAS REVISED TO ".08 GRAMS OR GREATER".

Prior to revision of the Utah State Code, the Salt Lake City ordinance and the State statute governing the presumed level of impairment were the same: "a breath alcohol content of 0.08% or greater by weight. . ." The State legislature subsequently changed the statute to a "breath alcohol concentration of .08 grams or greater". Utah Code Ann. Section 44-6-44(1)(a).

Defendant's Brief states that the City and State statutes are materially different (Defendant's Brief, p. 7). However, defendant failed to provide the Court with any evidence reflecting that alleged difference, other than the mere wording of the statutes. In recent years, the Utah courts have clearly placed the burden on appellants to "marshal the evidence". See State v. Larsen, 828 P.2d 487 (Utah App. 1992); and Ohline Corp. v. Granite Mill, 208 Utah Adv. Rep. 79 (1993). Defendant failed to provide this Court with any reason or basis on which to hold the wording in the statutes is materially different. As a result, this Court should assume that the ruling from the lower court is accurate, which ruling denied defendant's Motion after review of Memoranda submitted by both parties (R. 62, 53, 55, 58, 75). The only

evidence in the Record before this Court is that ".08%" and ".08 grams" have the same meaning (R. 64, 65).

As in the case of Richfield City v. Walker, 790 P.2d 87 (Utah App. 1990), the Salt Lake City and State statutes were at one time consistent. Subsequent amendments to the State statute have made the wording in the laws inconsistent but the Court requires that the difference "amount to an invalidating inconsistency." Richfield City, at 89. The Utah Supreme Court has held:

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. . . Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail. Salt Lake City v. Kusse, 92 P.2d 671, 673 (Utah 1938). See also, Layton City v. Glines, 616 P.2d 588 (Utah 1980).

Counsel for defendant argues that the Supreme Court seems to readopt the Dillon rule in Weese v. Davis County Com'n, 834 P.2d 1 (Utah 1992) (Defendant's Brief, p. 8), which rule was originally adopted to prevent abuse by local governments. The Weese case involved a specific constitutional limitation on counties incurring debt, an issue which may require more restrictions to prevent abuse. However, the case of State v. Hutchinson, 624 P.2d 1116 (Utah 1980), rejected the Dillon rule, stating that local ordinances were to be:

> . . . adjudged valid by the courts, provided they are reasonable and consonant with the general powers and purposes of the local corporation, and not inconsistent with the United States Constitution, treaties, and statutes, and the laws and policy of the state. Hutchinson, at 1125 (emphasis added).

The Court continued:

> "And the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of this State or of the United States. . . Specific grants should generally be construed with reasonable latitude in light of the broad language of the general welfare clause which may supplement the power found in a specific delegation. Hutchinson, at 1126 (emphasis added).

This Court should liberally construe the Salt Lake City statute as a public offense, in accordance with Hutchinson, finding the underlying policy of the Salt Lake City ordinance and the State statute is the same, particularly as there is no evidence of a conflict between the laws.

The standard of review for a trial court's question of law and statutory interpretation is to give no deference to the ruling of the lower court. Reeves v. Gentile, 813 P.2d 111 (Utah 1991). In that case, the Supreme Court stated:

> The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve. Reeves, at 115.

The purpose of the Salt Lake City DUI statute is to prevent people from operating a vehicle which they are in an intoxicated or impaired condition, a purpose which corresponds to the underlying purpose of the State Code.

II. THE IDENTICAL LANGUAGE IN BOTH THE CITY AND STATE STATUTES REGARDING AN ALTERNATIVE TO THE RESULTS OF A BREATH TEST COULD HAVE BEEN THE BASIS FOR THE JURY'S DECISION.

Driving under the influence of alcohol statutes for Salt Lake City and the State of Utah contain an alternative to the chemical

test. The alternative is the same and is unquestionably a public offense:

> Or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle. (See statutes set out fully in Addendum.)

The Information charging the defendant listed that alternative to the City proving results of a breath test (R. 8). Evidence of impairment was submitted to the jury but way of testimony of two police officers (R. 50). In addition, the jury was instructed as to the alternative language of the statutes and the interpretation of evidence presented at trial (R. 16, 19, 20, 21, 22, 23, 29). The verdict form signed by the foreperson of the jury clearly listed the alternative language (R. 43).

The jury could have rejected the breath test and based their decision solely on the alternative language that defendant was incapable of safely operating a vehicle. This Court should not now substitute its judgment for that of the jury as the Record reflects that the issue was properly submitted to them for consideration. State v. Booker, 709 P.2d 342, 345 (Utah, 1985).

Most cases state the standard of review for a jury verdict where sufficiency of the evidence is raised by an appellant. That issue has not been raised in the present case and there is no evidence for this Court to consider except that defendant was found guilty (R. 43). The Supreme Court has delineated the function of a jury as follows:

> The function of a jury is to act as reasonable persons in discerning the true state of the facts where factual

> disputes exist, to discern the credibility of witnesses, and to apply the law to the facts as instructed by the trial court in reaching a verdict. Jury verdicts are upheld
>
> (I)f there is any substantial competent evidence upon which a jury acting fairly and reasonably could make the finding. . . But if the finding is so plainly unreasonable as to convince the court that no jury acting fairly and reasonably could make the finding, it cannot be said to be supported by substantial evidence. Reeves, at 114-115.

As there is no evidence to show the jury was not acting fairly and reasonably, their verdict should be upheld.

Conclusion

The evidence before this Court based on the Record does not reflect a material difference between the provisions of the Salt Lake City Code and the Utah State statute governing the offense of driving under the Influence of alcohol. As a result, the Salt Lake City Code should be upheld as a public offense, particularly in view of the alternative language which could have been the sole basis for the jury verdict. The City respectfully requests that this Court uphold the conviction of defendant.

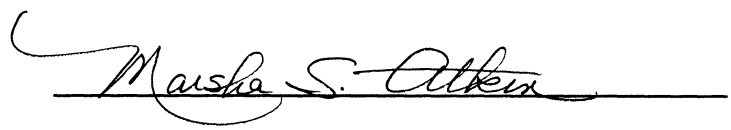
Dated this 28th day of June, 1993.

Marsha S. Atkin

Cheryl D. Luke
Marsha S. Atkin
Attorneys for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the Brief of Appellee was mailed to Mr. Robert H. Copier, Attorney for Defendant, 243 East 400 South, Suite 200, Salt Lake City, Utah 84111, this 28th day of June, 1993.



ADDENDUM

shall be entitled to park at any parking meter and in the following identified restricted parking areas, without charge, notwithstanding any other state or municipal parking restriction: Freight loading zones, passenger loading zones, and time-limited parking zones.

B. It is unlawful for such handicapped person to:

1. Park for longer than reasonable periods of time at all such meters and restricted parking areas where the maximum metered or designated time is longer than thirty minutes,

2. Park for longer than the maximum metered or designated time at all other meters and restricted parking areas except those listed under subsection A of this section.

12.24.030 INCOMPETENT DRIVERS DESIGNATED AND PROHIBITED.

No person under the age of sixteen years, and no person physically or mentally disabled or incapacitated in any particular, temporarily or permanently, shall drive a motor vehicle upon any street or alley, provided such disability or incapacity is such as to interfere with the reasonable and safe operation of such vehicle.

12.24.040 PERMITTING INCOMPETENT TO DRIVE PROHIBITED.

No driver or person having charge or control of any motor vehicle shall require or knowingly permit any prohibited person, as set forth in Section 12.24.030, or its successor, to drive the same or knowingly permit or require the operation of any vehicle in any manner contrary to law.

12.24.050 INCAPABLE DRIVERS DESIGNATED AND PROHIBITED.

No driver shall operate a vehicle while his or her ability or alertness is so impaired through fatigue, illness or any other cause as to make it unsafe for him or her to drive such vehicle.

12.24.060 PERMITTING INCAPABLE DRIVERS TO DRIVE PROHIBITED.

No owner or person in control of a vehicle shall knowingly permit said vehicle to be operated by any person who is physically or mentally disabled to such an extent that such person's judgment or driving ability is impaired.

12.24.070 DRINKING ALCOHOLIC BEVERAGES IN VEHICLES.

A. No person shall drink any alcoholic beverage while driving a motor vehicle or while a passenger in a motor vehicle, whether the vehicle is moving, stopped, or parked on any street or highway.

B. No person shall keep, carry, possess, transport, or allow another to keep, carry, possess or transport in the passenger compartment of a motor vehicle, when the vehicle is on any public street or highway, any container whatsoever which contains any alcoholic beverage, if the container has been opened, the seal thereon broken, or the contents of the container partially consumed.

C. For purposes of this section:

1. "Alcoholic beverages" shall have the meaning provided in Section 32-1-3, Utah Code Annotated, or its successor, and

2. "Passenger compartment" means the area of the vehicle normally occupied by the driver and his or her passengers, and includes areas accessible to them while traveling, such as a utility or glove compartment, but does not include a separate front or rear trunk compartment or other area of the vehicle not accessible to the driver or passengers while inside the vehicle.

D. The provisions of subsections A and B of this section shall not apply to passengers in the living quarters of a motor home or camper, but the driver of the vehicle will be prohibited from consuming alcoholic beverages as provided in subsection A of this section.

E. The provisions of subsection B shall not apply to passengers traveling in any duly licensed taxicab or bus.

F. Any person convicted of a violation of this section is guilty of an infraction.

12.24.080 INTOXICATED PERSONS IN OR ABOUT VEHICLES.

It is unlawful for any person under the influence of alcohol or any drugs to be in or about any vehicle with the intention of driving or operating such vehicle.

12.24.090 PERMITTING USE OF VEHICLE BY HABITUAL DRINKER OR DRUG USER.

It is unlawful for the owner of any motor vehicle, or any person having such in charge, to permit same to be driven or operated on any street by any person who is a habitual user of any drugs, or by any person who is under the influence of alcohol or any drugs.

12.24.100 DRIVING UNDER THE INFLUENCE OF DRUGS AND INTOXICANTS PROHIBITED - PENALTIES.

A. 1. It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this city if the person has a blood or breath alcohol content of .08 percent or greater by weight as shown by a chemical test given within two hours after the alleged operation or physical control, or if the person under the influence of alcohol or any drug, or the combined influence of alcohol or any drug to a degree which renders the person incapable of safely driving a vehicle within this city.

2. The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug does not constitute a defense against any charge of violating this section.

B. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood, and the percent by weight alcohol in the breath shall be based upon grams of alcohol per 210 liters of breath.

C. Every person who is convicted the first time of a violation of section A of this section shall be guilty of a Class B misdemeanor

D. 1. In addition to the penalties provided for in subsection C of this section, the court shall, upon a first conviction, impose either.

two-hundred-forty hours, with emphasis on serving in the drunk tank of the jail, or

b. Require the person to work in a community-service work program for not less than twenty-four hours nor more than fifty hours.

2. In addition to the requirements of subsection D1a or D1b above, the court shall order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, at the person's expense.

E. 1. Upon a second conviction within five years after a first conviction under this section, in addition to the penalties provided for in sub-section C, the court shall impose either:

a. A mandatory jail sentence of not less than two-hundred-forty consecutive hours nor more than seven-hundred-twenty hours, with emphasis on serving in the drunk tank of the jail, or

b. Require the person to work in a community-service work program for not less than eighty hours nor more than two-hundred-forty hours.

2. In addition to the requirements of subsection E1a or E1b above, the court shall order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, and the court may, in its discretion, order the person to obtain treatment at the person's expense at an alcohol rehabilitation facility.

F. 1. Upon a subsequent conviction within five years after a second conviction under this section, in addition to the penalties provided for in subsection C, the court shall impose either:

a. A mandatory jail sentence of not less than seven-hundred-twenty hours nor more than two-thousand-one-hundred-sixty hours with emphasis on serving in the drunk tank of the jail, or

b. Require the person to work in a community-service work project for not less than eighty hours nor more than seven-hundred-twenty hours.

2. In addition to the requirements of subsections F1a or F1b above, the court shall order the person at the person's expense to obtain treatment at an alcohol rehabilitation facility.

G. In no event shall any combination of imprisonment and/or community service imposed under subsections C, D, E and F above exceed six months' duration.

H. No portion of any sentence imposed under subsection C shall be suspended, and the convicted person shall not be eligible for parole or probation until such time as any sentence imposed under subsections D, E or F of this section has been served.

I. 1. When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 12.52.350 of this title, or its successor, in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not defendant had consumed alcohol or drugs, or a combination of both, in connection with the offense. The prosecutor's statement shall be an offer of proof of the facts which show whether or not defendant had consumed alcohol or drugs, or a combination of both, in connection with the offense.

2. The court shall advise the defendant, before accepting the plea offered under subsection I1 above, of the consequences of a violation of Section 12.52.350 of this title, or its successor, in substance as follows: "If the court accepts the defendant's plea of guilty or no contest to a charge of violating said Section 12.52.350, and the prosecutor states for the record that there was consumption of alcohol or drugs or a combination of both, by the defendant in connection with the offense, the resulting conviction shall be a prior offense fo the purpose of subsections E and F of this section."

J. A peace officer may, without a warrant, arrest a person for a violation of this section when:

1. The violation is coupled with an accident or collision in which the person is involved, or

2. The officer has reasonable cause to believe a violation has in fact been committed by the person, although not in the officer's presence.

K. This section 12.24.100 was enacted to be in harmony with and, in substance, the same as Section 41-6-44, Utah Code Annotated, 1953 as amended, or its successor.

12.24.110 CHEMICAL TESTS AS EVIDENCE.

A. In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or with a blood alcohol content statutorily prohibited, the results of a chemical test or tests, as authorized under Section 41-6-44.10, Utah Code Annotated, 1953, or its successor, shall be admissible as evidence.

B. If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person shall, at the time of the alleged driving or actual physical control, be presumed to have been not less than the level of the alcohol determined to be in the blood by the chemical test.

C. If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result shall be admissible as evidence of the person's blood alcohol level at the time of the alleged driving or actual physical control, but the trier of fact shall determine what weight shall be given to the result of the test.

D. The foregoing provisions of this section shall not prevent a court from receiving otherwise admissible evidence as to a defendant's blood alcohol level, or of other violations of this title, at the time of the alleged driving or actual physical control.

E. This Section 12.24.110 was enacted to be in harmony with and in substance the same as Section 41-6-44.5, Utah Code Annotated, as amended, or its successor.

(2) An ordinance adopted by a local authority that governs reckless driving, or operating a vehicle in willful or wanton disregard for the safety of persons or property shall be consistent with the provisions of this code which govern those matters.

History: C. 1953, 41-6-43, enacted by L. 1983, ch. 99, § 11; 1987, ch. 138, § 36.

Repeals and Enactments. — Laws 1978, ch. 33, § 54 repealed old § 41-6-43 (L. 1941, ch. 52, § 33; C. 1943, 57-7-110; L. 1957, ch. 75, § 1; 1967, ch. 88, § 1; 1969, ch. 107, § 1), relating to powers of local authorities as to driving while intoxicated and reckless driving, and a new § 41-6-43 was enacted by Laws 1979, ch. 242, § 12.

Laws 1983, ch. 99, § 11 repealed former § 41-6-43 (L. 1979, ch. 242, § 12), relating to powers of local authorities, and enacted present § 41-6-43.

Amendment Notes. — The 1987 amendment substituted "operating" for "driving" both places it appears in this section and made minor changes in punctuation.

Cross-References. — Traffic regulations, powers and duties of cities as to, § 10-8-30.

NOTES TO DECISIONS

ANALYSIS

Effect of interim repeal.
Powers of cities.

Effect of interim repeal.

The interim repeal of this section did not render municipalities without authority to enact ordinances prohibiting driving under the influence of alcohol as municipalities had authority under their general police powers to enact such ordinances in the absence of a specific legislative grant of authority. Layton City v. Glines, 616 P.2d 588 (Utah 1980).

Powers of cities.

City held to have power to pass ordinance prohibiting driving while intoxicated, notwithstanding statute on the subject. Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938).

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 296 et seq.

C.J.S. — 61A C.J.S. Motor Vehicles §§ 625 to 637.

Key Numbers. — Automobiles ⇐ 332.

41-6-43.10. Repealed.

Repeals. — Section 41-6-43.10 (L. 1955, ch. 71, § 1; 1957, ch. 78, § 2; 1983, ch. 99, § 12), relating to negligent homicide, was repealed by Laws 1985 (1st S.S.), ch. 1, § 2.

41-6-44. Driving under the influence of alcohol or drug or with specified or unsafe blood alcohol concentration — Measurement of blood or breath alcohol — Criminal punishment — Arrest without warrant — Penalties — Suspension or revocation of license.

(1) (a) It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this state if the person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours

after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) Every person who is convicted the first time of a violation of Subsection (1) is guilty of a class B misdemeanor. But if the person has inflicted a bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner, he is guilty of a class A misdemeanor.

(b) In this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care which an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) In addition to any penalties imposed under Subsection (3), the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(5) (a) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1), the court shall, in addition to any penalties imposed under Subsection (3), impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility. The court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility.

(b) Upon a subsequent conviction within five years after a second conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1), the court shall, in addition to any penalties imposed under Subsection (3), impose a mandatory jail sentence of not less than 720 nor more than 2,160 hours with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 240 nor more than 720 hours and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility.

(c) No portion of any sentence imposed under Subsection (3) may be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation

or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) may not be terminated and the department may not reinstate any license suspended or revoked as a result of the conviction, if it is a second or subsequent conviction within five years, until the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution and rehabilitation costs, assessed against the person, have been paid.

(6) (a) The provisions in Subsections (4) and (5) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility; or obtain, mandatorily, treatment at an alcohol rehabilitation facility; or do any combination of those things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior offense under Subsection (7). The court is required to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior offense under Subsection (7), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections 41-6-44(4) and (5).

(b) For purposes of determining whether a conviction under Section 41-6-45 which qualified as a prior conviction under Subsection (7), is a first, second, or subsequent conviction under this subsection, a previous conviction under either this section or Section 41-6-45 is considered a prior conviction.

(c) Any alcohol rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Social Services.

(7) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted under Subsection 41-6-43(1) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement is an offer of proof of the facts which shows whether there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows. If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction is a prior offense for the purposes of Subsection (5).

(c) The court shall notify the department of each conviction of Section 41-6-45 which is a prior offense for the purposes of Subsection (5).

(8) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has

occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(9) The Department of Public Safety shall suspend for 90 days the operator's license of any person convicted for the first time under Subsection (1), and shall revoke for one year the license of any person convicted of any subsequent offense under Subsection (1) if the violation is committed within a period of five years from the date of the prior violation. The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 41-2-130, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33; 1985, ch. 46, § 1; 1986, ch. 122, § 1; 1986, ch. 178, § 29; 1987, ch. 138, § 37; 1987 (1st S.S.), ch. 8, § 2; 1988, ch. 17, § 1.

Amendment Notes. — The 1985 amendment divided Subsection (3) into Subsections (3)(a) and (3)(b); deleted "of this section" before "shall be punished" in the first sentence of Subsection (3)(a); divided the former first sentence of Subsection (3)(a) into the first and second sentences, substituting "But" for "except that" at the beginning of the second sentence of Subsection (3)(a); divided Subsection (5) into Subsections (5)(a) through (5)(c); divided the former first sentence of Subsection (5)(a) into the first and second sentences; substituted "may" for "shall" in three places in Subsection (5)(c); deleted "such time as" after "probation until" in the first sentence of Subsection (5)(c); deleted "and unless" before "the convicted person" near the end of Subsection (5)(c); divided Subsection (6) into Subsections (6)(a) and (6)(b); deleted "of this section" at the end of Subsections (7)(b) and (7)(c); substituted "the officer has probable cause to believe the violation has occurred" for "the violation is coupled with an accident or collision in which the person is involved and when the violation has, in fact, been committed" in Subsection (8); substituted "probable" for "reasonable" near the end of Subsection (8); deleted "a period of" before "90 days" and "of this section" before "and shall revoke" in Subsection (9); and made minor changes in phraseology, punctuation, and style.

The 1986 amendment by Laws 1986, ch. 122, in Subsection (4) deleted "for" following "provided" and substituted "240 hours" for "ten days", "24 hours" for "two" and "80 hours" for "ten days"; in Subsection (5)(a) substituted "240" for "48", "720 hours" for "ten days", "80 hours" for "ten", and "240 hours" for "30 days"; and in Subsection (5)(b) substituted "720" for "30", "2,160 hours" for "90 days", "240" for "30", and "720 hours" for "90 days".

The 1986 amendment by Laws 1986, ch. 178, in Subsection (3)(a), substituted the language beginning "is guilty of a class B misdemeanor" for "shall be punished by imprisonment for not less than 60 days nor more than six months, or by a fine of $299, or by both the fine and imprisonment" in the first sentence and the language beginning "is guilty of a class A misdemeanor" for "shall be punished by imprisonment in the county jail for not more than one year, and, in the discretion of the court, by a fine of not more than $1,000" in the second sentence.

The 1987 amendment designated the previously undesignated provisions of Subsection (1) as last amended by Laws 1986, ch. 178, § 29 and rewrote the provisions of Subsection (a) to the extent that a detailed analysis is impracticable; in Subsection (2) added the phrase following "centimeters of blood"; in Subsection (3)(a) deleted "imprisonment shall be for not fewer than 60 days" following "misdemeanor" in the first sentence and deleted "any imprisonment in the county jail shall be for not more than one year" at the end of the second sentence; in Subsection (6)(b) deleted "41-6-44 or"; in Subsection (7)(a) substituted "41-6-43(1)" for "41-6-43(b)"; in Subsection (9) substituted "41-2-130" for "41-2-19.6"; and made minor changes in phraseology and punctuation throughout the section.

This section was set out in 1987 as reconciled by the Office of Legislative Research and General Counsel.

The 1987 (1st S.S.) amendment, effective June 5, 1987, substituted "concentration of .08 grams or greater as shown by a chemical test" for "content of .08% or greater by weight as shown by a chemical test" in Subsection (1) (a), substituted the provisions of Subsection (2) for the former provisions which read "Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood, and the percent by weight of alcohol in the breath shall be based upon grams of alcohol per 210 liters of breath", and

92-56002

INTOXILYZER 5000
OPERATIONAL CHECKLIST

SUBJECT RICHARD COPIER DATE 5-31-92 TIME _____

INSTRUMENT #6 LOCATION 315 E 2005 O

OPERATOR J PAYNE #63

(✓) 1. RED POWER SWITCH ON, INSTRUMENT READS "PUSH BUTTON TO START TEST--TIME--"ETC.

(✓) 2. PUSH GREEN START BUTTON

(✓) 3. INSERT CARD.(INSTRUMENT WILL AUTOMATICALLY GO THRU AIRBLANK, 3 INTERNAL CALIBRATIONS, AND ANOTHER AIRBLANK).

(✓) 4. INSERT STERILE MOUTHPIECE INTO BREATH-HOSE, INSTRUMENT WILL READ"PLEASE BLOW/R INTO MOUTH-PIECE UNTIL TONE STOPS, PLEASE BLOW/R".

(✓) 5. OBTAIN BREATH SAMPLE, HAVE SUBJECT BLOW INTO MOUTHPIECE/BREATH-HOSE.

(✓) 6. REMOVE MOUTHPIECE, RETURN BREATH-HOSE TO BRACKET. (INSTRUMENT WILL GO THRU AUTOMATIC AIRBLANK, AND PRINT RESULTS ON TEST RECORD CARD).

(✓) 7. RETRIEVE CARD UPON COMPLETION OF PRINTOUT.

(✓) 8. TURN OFF INSTRUMENT - RECORD TIME.

END OF TEST

HPT-21 P.221

THIS SIDE UP THIS EDGE IN 41352 10-89

SALT LAKE CITY POLICE DEPT.
INTOXILYZER - ALCOHOL ANALYZER
MODEL 5000 SN 66-002482
05/31/92

TEST	BRAC	TIME
AIR BLANK	.000	00:34
INTERNAL 1	.099	00:34
INTERNAL 2	.200	00:34
INTERNAL 3	.305	00:34
AIR BLANK	.000	00:35
SUBJECT TEST	.101	00:37
AIR BLANK	.000	00:38

RICHARD COPIER
SUBJECT'S NAME

0019 315 E 2005 O
TIME FIRST OBSERVED INSTRUMENT LOCATION

J. PAYNE #63
OPERATOR

ADDITIONAL INFORMATION AND / OR REMARKS

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